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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellant, v. MICHAEL REYES VALENZUELA, Appellee.	2 CA-CR 2010-0185 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094787001

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

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E C K E R S T R O M, Judge.

¶1 Plaintiff/appellant the State of Arizona appeals from the trial court's order granting defendant/appellee Michael Valenzuela's motion to suppress evidence. Because

the court did not err when it concluded the search of Valenzuela's vehicle exceeded the scope of a lawful inventory search, we affirm the court's ruling.

Factual and Procedural Background

¶2 When reviewing a trial court's ruling on a motion to suppress evidence, we consider only the evidence presented at the suppression hearing. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). Moreover, we view the evidence from the suppression hearing "in the light most favorable to sustaining the trial court's ruling." *State v. Weekley*, 200 Ariz. 421, ¶ 3, 27 P.3d 325, 326 (App. 2001). Tucson Police Officer Jacques Spronken testified at the suppression hearing that, while standing beside a residential street, he observed Valenzuela driving "at a[n] extremely high rate of speed" down the street and "attempted to slow him down by using [a] flashlight." Valenzuela then abruptly stopped the vehicle, slowly passed Spronken and another officer, Mathew Timpf, and then quickly accelerated, causing the vehicle's tires to "peel out." Spronken and Timpf pursued the vehicle to a nearby apartment complex, where Valenzuela and the vehicle's passengers dispersed. After a brief chase, Spronken and Timpf detained Valenzuela.[1] The officers determined that Valenzuela had been driving with a suspended license and that his vehicle would be impounded pursuant to police department policy.

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[1]One of the vehicle's passengers was also detained; two of them escaped from the officers.

¶3 In furtherance of impounding the vehicle, Officer Frank Hanson conducted an inventory search. During the course of the inventory search, Hanson found a black nylon bag on the floor containing plastic bags, a digital scale, and a pipe. He also found methamphetamine under the cup holder in the center console. Hanson stated that he lifted up the cup holder and searched underneath it because "[i]t wasn't seated properly" and "in the past [he] ha[d] pulled out cupholders" in this model of car.

¶4 The trial court found that although the officers had authority to impound the vehicle and conduct an inventory search, "picking up and removing the cupholder and looking underneath was beyond the scope of a valid inventory search." Accordingly, it granted Valenzuela's motion to suppress the evidence. After the trial court granted the state's motion to dismiss the charges without prejudice, it filed this appeal.

Discussion

¶5 The state asserts that the trial court erred in granting Valenzuela's motion to suppress the evidence found within the center console in a space underneath the cup holder. As noted above, the court found that the officer had exceeded the scope of an otherwise valid inventory search when he removed the cup holder and searched the space underneath it. We review the trial court's factual findings, such as what constitutes a police department's standard inventory search procedure, for an abuse of discretion. *See United States v. Bowhay*, 992 F.2d 229, 230 (9th Cir. 1993). We review de novo the ultimate legal question of whether the officer exceeded the lawful scope of the search.

See State v. Moody, 208 Ariz. 424, ¶ 62, 94 P.3d 1119, 1140 (2004); *State v. Ahumada*, 225 Ariz. 544, ¶ 14, 241 P.3d 908, 912 (App. 2010).

¶6 The Fourth Amendment to the United States Constitution and article II, § 8 of the Arizona Constitution protect against unreasonable searches and seizures. *State v. Allen*, 216 Ariz. 320, ¶ 9, 166 P.3d 111, 114 (App. 2007). A search without a valid warrant is presumed to be unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). "[I]nventory searches are . . . a well-defined exception to the warrant requirement of the Fourth Amendment." *Colorado v. Bertine*, 479 U.S. 367, 371 (1987). The state has the burden to prove a warrantless search was lawful. *State v. Valle*, 196 Ariz. 324, ¶ 19, 996 P.2d 125, 131 (App. 2000). To be valid under the Fourth Amendment, inventory searches "must not be a pretext for a search for evidence, . . . they must occur according to standardized procedures, and . . . evidence of these standardized procedures must be in the record to uphold a conviction." *State v. Rojers*, 216 Ariz. 555, ¶ 20, 169 P.3d 651, 655 (App. 2007).

¶7 The general operating procedures of the Tucson Police Department (TPD) specify that the purposes of a vehicle inventory are "to protect the owner's property while it is in police custody, to protect [department] members against claims of lost, damaged, or stolen property and to protect members and the community from loss and potential danger." Tucson Police Department, General Orders, 2 Standard Operating Procedures § 2365 (rev. ed. Apr. 1, 2009). In carrying out these purposes, "[a] complete inventory

shall be made of all vehicle contents, including all containers in the vehicle, whether locked or unlocked." *Id*. § 2365.2.

¶8 The state asserts, without providing supporting authority, that "[t]he cupholder was a container in the vehicle, and Officer Hanson followed the procedures in searching it." As set forth above, TPD policy expressly allows the inventory of closed containers in a vehicle. It does not, however, define the term "container." At the suppression hearing, Hanson testified that he believed the space underneath the cup holder is a container, but there was no evidence that the space would have been so recognized under TPD's general policy. *See* 3 Wayne R. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 7.4(a), at 645 n.71 (4th ed. 2004) (testimony that particular procedure "is the standard practice of the particular officer" insufficient to establish standardized department policy for valid inventory search); *see also United States v. Kordosky*, 909 F.2d 219, 220-21 (7th Cir. 1990) (officer's responses to questions about "your standard practice" insufficient to establish department policy and procedures). In finding that the officer's search exceeded the scope of a valid inventory search, the trial court implicitly found that the space underneath the cup holder was not a "container," as that term is used in TPD inventory search procedures. *Cf. United States v. Kennedy*, 427 F.3d 1136, 1144-45 (8th Cir. 2005) (government failed to prove compliance with police department search procedures in absence of evidence that "searching officer would construe 'boxes, briefcases, and containers' [pursuant to department inventory policy] to include the area beneath a stereo speaker"). The state did

not satisfy its burden to show that TPD's standardized inventory procedure for searching containers included the space underneath the cup holder.

¶9 The trial court also implicitly found that the search underneath the cup holder did not otherwise fit into a standardized inventory search procedure. Indeed, there is no written TPD policy allowing officers to search in places that would require parts of the vehicle to be taken apart. We recognize that a department's standardized inventory policy sufficient to support a warrantless search may be unwritten. *United States v. Hawkins*, 279 F.3d 83, 86 (1st Cir. 2002). But here, although Hanson testified he routinely looks underneath the cup holder when performing inventory searches, as stated above, "it is not sufficient that the inventory is the standard practice of the particular officer." 3 LaFave, *supra*, § 7.4(a), at 645 n.71. Rather, the state must show the practice falls within the department's general policy. *See Florida v. Wells*, 495 U.S. 1, 3-5 (1990) (inventory search must be based on standardized criteria so as not to "be a ruse for a general rummaging in order to discover incriminating evidence").

¶10 Thus, without a policy authorizing him to remove the cup holder as part of an inventory search in order to search the space below, Hanson exceeded the scope of such a search when he did so. *Cf. State v. Acosta*, 166 Ariz. 254, 258-59, 801 P.2d 489, 493-94 (App. 1990) (upholding suppression of evidence because, absent evidence of police department regulations on inventory searches, it was uncertain contraband hidden inside rear interior compartment panel would have inevitably been discovered in such search); *Commonwealth v. Baptiste*, 841 N.E.2d 734, 736, 740 (Mass. App. Ct. 2006)

(assuming for purposes of decision that when law enforcement officer looked under cup holder after unsuccessful attempt to release it from console, officer had exceeded scope of valid inventory search).

¶11 Given that the primary purposes of an inventory search are "the protection of the owner's property and 'the protection of the police against claims or disputes over lost or stolen property,'" *State v. Floyd*, 120 Ariz. 358, 361, 586 P.2d 203, 206 (App. 1978), *quoting South Dakota v. Opperman*, 428 U.S. 364, 369 (1976), other courts have held an inventory search "does not permit a search of hidden places, certainly not the removal of car parts in an effort to locate contraband or other property. The owner having no legitimate claim for protection of property so hidden, the police could have no legitimate interest in seeking it out." *People v. Andrews*, 85 Cal. Rptr. 908, 914 (Ct. App. 1970), *disapproved on other grounds by Mozzetti v. Superior Court*, 484 P.2d 84 (Cal. 1971); *see also United States v. Best*, 135 F.3d 1223, 1224-25 (8th Cir. 1998) (beyond scope of inventory search to remove door panel from car to seize contraband); *United States v. Lugo*, 978 F.2d 631, 636-37 (10th Cir. 1992) (same); *People v. Rutovic*, 566 P.2d 705, 706 (Colo. 1977) (search inside zippered cover of front seat armrest exceeded scope of inventory search). The trial court did not err in concluding the search underneath the cup holder exceeded the scope of a valid inventory search.

¶12 In an argument developed for the first time on appeal, the state contends the search was lawful because Hanson had probable cause to believe the car contained contraband at the time he searched under the cup holder. Because the state never raised

this theory until after the suppression hearing had been completed and the trial court had ruled, the court was not given the opportunity to address that contention with the relevant facts fully developed and with the defendant having had an opportunity to respond. Accordingly, we will not address the merits of this argument. *See State v. West*, 176 Ariz. 432, 440, 862 P.2d 192, 200 (1993) ("In fact-intensive inquiries on motions to suppress, the court is not obliged to consider new theories from either side asserted for the first time on appeal, and there are good reasons for not doing so."), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998); *accord State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988).

Disposition

¶13 We affirm the trial court's order suppressing the evidence.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge